

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ANTHONY GEORGE ALLEN, )  
Plaintiff, )  
v. ) CIVIL ACTION NO. 05-31E  
UNITED STATES OF AMERICA, ) Judge Sean J. McLaughlin  
Defendant. ) Magistrate Judge Susan Paradise Baxter

**DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT  
OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT**

AND NOW, comes Defendant, the United States of America, by and through its attorneys, Mary Beth Buchanan, United States Attorney for the Western District of Pennsylvania and Jessica Lieber Smolar, Assistant United States Attorney, and pursuant to Fed.R.Civ.P. 12(b)(1), (6) and 56 respectfully moves the Court to issue an Order dismissing the Amended Complaint heretofore filed by Plaintiff Anthony George Allen, with prejudice, because this Court lacks jurisdiction over the subject matter therein. Plaintiff's negligence claims are barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a). The United States has not waived its sovereign immunity with regard to these types of tort allegations, and as a result, these claims must fail. Moreover, even if the Court had jurisdiction, Plaintiff's negligence claim fails as a matter of law.

Alternatively, pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant moves the Court to enter summary judgment in favor of Defendant, upon the grounds that there is no genuine issue as to any material fact and Defendant is entitled to judgment as a matter of law.

A brief in support of this motion is filed contemporaneously herewith.

A proposed order is attached.

Respectfully submitted,

MARY BETH BUCHANAN  
UNITED STATES ATTORNEY

By: /s/ Jessica Lieber Smolar  
JESSICA LIEBER SMOLAR  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing *Defendant's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment*, was mailed, postage prepaid, this 2<sup>nd</sup> day of September, 2005, to the following:

Anthony George Allen  
Register No. 40420-053  
FCI McKean  
P.O. Box 8000  
Bradford, PA 16701

/s/ Jessica Lieber Smolar  
JESSICA LIEBER SMOLAR  
Assistant United States Attorney